

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-6073

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-6073

MOBIL OIL CORPORATION, GULF OIL CORPORATION, SHELL OIL COMPANY
and STANDARD OIL COMPANY OF CALIFORNIA,

Plaintiffs-Appellees,

-against-

FEDERAL TRADE COMMISSION and MICHAEL PERTSCHUK, Chairman, PAUL
DIXON, Member, M. ELIZABETH HANFORD DOLE, Member, CALVIN J.
COLLIER, Member and DAVID A. CLANTON, Member and CAROL M.
THOMAS, Secretary; as officers of the FEDERAL TRADE
COMMISSION,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

SUGGESTION FOR REHEARING EN BANC

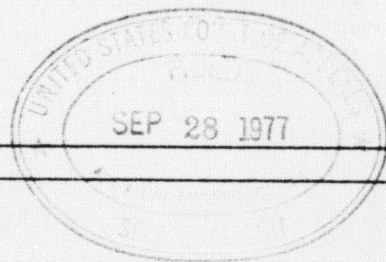
Of Counsel:

CHARLES F. RICE
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017

ANDREW J. KILCARR
VINCENT TRICARICO
Donovan Leisure Newton & Irvine
1666 K Street, N.W.
Washington, D.C. 20006

THOMAS R. TROWBRIDGE III
Donovan Leisure Newton & Irvine
30 Rockefeller Plaza
New York, New York 10020

Counsel for Appellee
Mobil Oil Corporation



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-6073

Mobil Oil Corporation, Gulf Oil Corporation,
Shell Oil Company and Standard Oil Company
of California,

Plaintiffs-Appellees

v.

Federal Trade Commission and Michael Pertschuk,
Chairman, Paul Rand Dixon, Member, M. Elizabeth Hanford
Dole, Member, Calvin J. Collier, Member and David A.
Clanton, Member and Carol M. Thomas, Secretary; as
officers of the Federal Trade Commission,

Defendants-Appellants

SUGGESTION FOR REHEARING EN BANC

Pursuant to Rule 35 of the Federal Rules of
Appellate Procedure, Appellees hereby suggest a rehearing en
banc of this appeal which was decided on September 14, 1977 by
a panel consisting of a single judge of this Court and two
federal district court judges. Appellees submit that rehearing
en banc is appropriate because: (1) the panel's decision to
"leave to another day the determination as to whether an EIS
must precede the final order" in In re Exxon Corp., FTC Dkt.
No. 8934 ("Exxon"), is inconsistent with prior decisions of
this Court; and (2) the proceeding involves questions of
exceptional importance.

STATEMENT OF THE CASE

Appellees are respondents in the Exxon adjudicatory proceeding brought by the Federal Trade Commission ("FTC") under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Appellees brought suit in the United States District Court for the Southern District of New York to require the FTC to file an environmental impact statement ("EIS") on the grounds that Exxon, which seeks to restructure the petroleum industry and which is being prosecuted at a cost of millions of dollars annually, is "major Federal action significantly affecting the quality of the human environment" within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332(2)(C). The District Court agreed, granted plaintiffs' motion for summary judgment and held that Rule 1.82(d) of the FTC's Rules of Practice, 16 C.F.R. § 1.82(d), which provides that § 102(2)(C) of NEPA does not apply to any adjudicatory proceeding brought by the FTC, was null and void. The Court directed the FTC to prepare a draft EIS, but on appeal to this Court the panel reversed, holding that the FTC is not required to file an EIS at the commencement of its adjudicatory proceedings nor at this stage of the Exxon proceeding.

I.

THE PANEL'S DECISION IS NOT IN CONFORMITY WITH PRIOR DECISIONS OF THE COURT

In its opinion of September 14, 1977 ("Opinion"), the panel began its analysis by holding that the "critical agency

decision" for NEPA purposes in Exxon will take place "when the final order is issued by the Commission." (Opinion, p. 4). However, the panel also decided to "leave to another day the determination as to whether an EIS must precede the final order [in Exxon]." (Opinion, p. 5). Thus, the panel ended its analysis at the precise point where it began and failed to recognize the proposition, well-settled in this circuit, that an EIS must precede the "critical agency decision."

The very case cited by the panel in support of its "critical agency decision" determination, Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79 (2d Cir. 1975), demonstrates the need for an en banc hearing to maintain the uniformity of this Court's decisions. In Natural Resources, this Court discussed the possibility of amending and supplementing an EIS in light of proposed changes or deficiencies without recirculating an entire new document. The Court stated:

Although an EIS may be supplemented, the critical agency decision must, of course, be made after the supplement has been circulated, considered and discussed in the light of alternatives, not before. Otherwise the process becomes a useless ritual, defeating the purpose of NEPA, and rather making a mockery of it. Id. at 92. (Emphasis added.)

It is clear from this case that the critical agency decision in Exxon must be made after circulation of an EIS. Yet the panel's decision in the instant case fails to specify any time at which the FTC must prepare an EIS if one is required, and leaves open the possibility that it can be prepared simultaneously with, or subsequent to, entry of a final order. It

leaves the parties without any guidance as to when the Commission must decide to file or forego filing an EIS and therefore gives no guidance as to when the FTC's decision may be challenged.

In Natural Resources this Court also stated that "[i]f the spirit as well as the letter of NEPA is to have any real meaning," id. at 95, the Navy had to file an EIS assessing the environmental impact of several alternative courses of action, with enough time for thorough consideration and discussion before taking any proposed action. An EIS which failed to meet this standard, the Court held, would be "a mere rubber stamp for post hoc rationalization of decisions already made." Id. If an EIS in Exxon is to meet the standards established by this Court, it must be prepared well in advance of the entry of the final order. Yet the panel has concluded, by leaving the issue for "another day," that the FTC may not have to prepare an impact statement until it issues its final order.

The panel said that it was unnecessary to decide the question of whether an EIS is required in a § 5 adjudicatory proceeding because it was persuaded by the FTC's argument that, "if an EIS must be prepared, the proper time to do so is when the proceeding reaches the remedial stage." (Opinion, p. 3). The panel failed to recognize, however, that the FTC's Rules do not expressly provide for a "remedial stage" as such. The Commission is not

required under its Rules to "propose" relief and the Commission is free simply to enter a final decision ordering relief. In these circumstances, the "critical agency decision" to which the panel referred will conclude the decision-making process within the agency, foreclosing any possibility that respondents will be able to raise environmental considerations before the Commission.

The panel also failed to consider the implication of not requiring an EIS until the "remedial stage" even if such a stage is ultimately provided for in Exxon. If, for example, there is a finding of violation and appellees then seek to raise environmental questions about proposed divestiture, it is unlikely that the FTC would cooperate in assessing the environmental consequences. Moreover, an EIS prepared at that time would not permit adequate discussion and consideration of possible alternatives in accordance with the holding in Natural Resources, supra, and would more likely be a post hoc rationalization of the type criticized in Natural Resources. Since the FTC believes that, under Rule 1.82(d), it is not required to prepare an EIS at any stage and the panel has given petitioners no indication of when they may seek to require the FTC to prepare an EIS, the practical effect of the panel's decision is to hold that the FTC need never prepare an EIS.

Other cases in which this Court has consistently held that an EIS must accompany a proposal for Federal action through the entire agency review process demonstrate that the panel's decision to defer consideration of the important issues raised by

this case is not in conformity with prior decisions. In Greene County Planning Board v. Federal Power Commission, 455 F.2d 412, 422 (2d Cir.), cert. denied, 409 U.S. 849 (1972), the Court concluded that the FPC was "in violation of NEPA by conducting hearings prior to the preparation by its staff of its own impact statement" on an application for construction of a high-voltage transmission line. Similarly, in Harlem Valley Transportation Association v. Stafford, 500 F.2d 328 (2d Cir. 1974) in which an EIS was required in railroad abandonment proceedings, the Court affirmed a ruling requiring the Interstate Commerce Commission to have its staff prepare a draft impact statement prior to any hearing.

The panel attempted to overcome these holdings by relying on the Supreme Court's decisions in Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289 (1975) ("SCRAP II") and Kleppe v. Sierra Club, 427 U.S. 390 (1976). The panel cited these cases in holding that "an agency must prepare an EIS at the time it makes a recommendation or report on a specific proposal for federal action. It need not be prepared 'during the germination process of a potential proposal.'" (Opinion, p.3-4, quoting Kleppe, supra at 406.) The panel was mistaken, however, in holding that "[s]uch action does not take place at the commencement of a § 5 adjudicatory proceeding but occurs, if at all, when the final order is issued by the Commission." (Opinion, p. 4). Kleppe referred to an earlier stage

of agency action. It reversed a lower court decision that an EIS was required when the Department of the Interior "contemplated" a regional development plan. 427 U.S. at 403. The Supreme Court pointed out however, that the Department had already prepared impact statements on several "proposals" for action. 427 U.S. at 400. Thus, the panel's decision would allow the FTC to jump from contemplated action to a final order and thereby evade NEPA by omitting the proposal stage. Yet the relief sought by the FTC is proposed action of the kind which had already been the subject of an EIS in Kleppe. A final order cannot be viewed as a proposal. By the time it is issued, the Commission will have completed its assessment of the relief to be included in the order and will have done so, under the panel's decision, without assessing the potentially wide-ranging environmental consequences of its action.

The Exxon proceeding is also distinguishable from SCRAP II where the Court held that a proposal for major federal action made by private parties (certain railroads) did not yet constitute an agency proposal triggering the EIS requirement of NEPA. As the Court said, "[w]here an agency initiates federal action by publishing a proposal and then holding hearings on the proposal, the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing." 422 U.S. at 320 (emphasis added). In Exxon, it is the FTC which issued the complaint and specified the proposed relief.

This Court distinguished SCRAP II in its decision in Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission, 539 F.2d 824 (2d Cir. 1976), cert. granted 97 S.Ct. 1578 (1977). In that decision this Court observed that the interim rate increase proposed in SCRAP II was "entirely nonfinal" and "facially neutral in its own environmental impact." 539 F.2d at 844. SCRAP II involved "no irreversible commitments of resources." Id. The panel's determination that, as in SCRAP II, there will be no "irreversible and irretrievable commitments of resources" (Opinion, p.4) to actions affecting the environment in the Exxon case prior to issuance of a final order ignores the practical realities of that proceeding. It reduces to empty rhetoric language which Congress included in NEPA to insure that the environment would be considered by federal agencies at a point when it would be meaningful. By the time a final order is issued in Exxon, the FTC will have invested many millions of dollars in a proceeding designed to accomplish certain antitrust objectives which are being pursued without any consideration of their environmental consequences. By permitting the Commission to proceed in this manner, the panel's holding is totally inconsistent with the Court's decisions in Harlem Valley, Greene County, and Natural Resources Defense Council, supra.

The panel gave as one reason for its decision the expressed concern that controversy over an EIS "concerning events

which may never occur" (Opinion, p. 4) might indefinitely delay the FTC in undertaking its statutory duties. However, the possibility of delay was rejected by this Court as a ground for avoiding the EIS requirement of NEPA in Greene County:

Fully recognizing that delay unfortunately is incident to our mandate...we can only add our voice to that of the District of Columbia Circuit in Calvert Cliffs': Delay is a concomitant of the implementation of the procedures prescribed by NEPA, and the spectre of a power crisis "must not be used to create a blackout of environmental consideration in the agency review process." 449 F.2d at 1122. "It is far more consistent with the purposes of the Act to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible." Id. at 1128. 455 F. 2d at 422-23.

Moreover, the panel's reliance on the fact that the events "may never occur" begs the question. If the environmental consequences of major federal action are to be given meaningful consideration, an EIS must be prepared at a stage when the events may never occur; once it is certain that the events will occur it will be too late to give meaningful consideration to their environmental consequences.

Appellees submit that, for the above reasons, rehearing en banc of this appeal is necessary to maintain uniformity of this Court's decisions.

II.

THE QUESTION OF THE APPLICATION OF NEPA TO FTC ADJUDICATORY PROCEEDINGS SEEKING INDUSTRY-WIDE RELIEF IS OF EXCEPTIONAL IMPORTANCE

NEPA was designed to establish "a national policy to guide Federal activities, which are involved with or related to the management of the environment or which have an impact on the quality of the environment." S. Rep. No. 91-296, 91st Cong., 1st Sess., reprinted in 115 Cong. Rec. (Part 14) 19010 (July 10, 1969) (emphasis added).

The questions presented by this appeal are of exceptional importance because the Court's decision will determine whether the intent of Congress, as evidenced by the plain language of the Act and the report cited above, should be defeated by unsupported hypotheses that meaningful consideration of the environment must yield to other law enforcement objectives or that the objectives of the Federal Trade Commission Act and NEPA are somehow mutually exclusive.

The relief proposed in Exxon vividly demonstrates that to carve out of NEPA an entire category of agency action simply because one method of achieving agency objectives is chosen over another can have serious, far-ranging and detrimental environmental consequences. In Exxon, the following relief has been proposed:

- (1) Divestiture of 40 to 60 percent of respondents' refinery capacity in the relevant market;

- (2) Creation of 10 to 13 new firms;
- (3) Total divestiture to the new firms of all crude and product pipelines which connect directly to the spinoff refineries;
- (4) Transfer of fractional ownership shares in connecting joint venture pipelines to the new firms;
- (5) A ban against future refinery acquisitions by respondents;
- (6) Limitations upon respondents' joint ventures;
- (7) Limitations upon processing arrangements whereby respondents rent independent refinery capacity; and possibly
- (8) Limitations upon crude oil and petroleum product exchanges. Appellees' Brief, Joint Appendix at 217-221.

The District Court concluded that this relief was major federal action with significant environmental consequences, holding that it "would operate to 'restructure the petroleum industry and alter the manner in which oil, a depletable natural resource, is produced, distributed and used.'" Mobil Oil Corp. v. FTC, 430 F.Supp. 855, 875 (S.D.N.Y. 1977) (footnotes omitted). The Court noted that the Commission did "not really dispute this," id., and the Commission did not dispute this conclusion on appeal either. Thus, the FTC is spending millions of dollars in prosecuting a case which it does not deny will have substantial environmental consequences if it is successful. The fact that Exxon is an adjudicative proceeding in no way diminishes its environmental implications. It is therefore important to decide now whether a federal agency may commit itself to a pro-

ceeding, the environmental impact of which would be admittedly significant, without complying with NEPA simply because it is labelled "adjudication."

As discussed in Point I, supra, there is an additional reason why it is exceptionally important that this Court decide now whether an EIS is required in Exxon and, if so, when. Failure to resolve these issues at this time leaves the parties completely in the dark as to the Commission's responsibilities under NEPA and appellees' rights with respect to whether, and when, they may challenge the Commission's disregard of the environment.

CONCLUSION

For the reasons discussed herein, appellees respectfully submit that the Court should reconsider this appeal en banc.

Dated: September 28, 1977

Respectfully submitted,

Andrew J. Kilcarr

Of Counsel:
CHARLES F. RICE
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017

ANDREW J. KILCARR
VINCENT TRICARICO
Donovan Leisure Newton & Irvine
1666 K Street, N.W.
Washington, D.C. 20006

THOMAS R. TROWBRIDGE III
Donovan Leisure Newton & Irvine
30 Rockefeller Plaza
New York, New York 10020

Counsel for Appellee
Mobil Oil Corporation

Of Counsel:

GEORGE W. WOLBERT
S. R. VANDIVORT
A. M. MINOTTI
Shell Oil Company
One Shell Plaza
Houston, Texas 77001

J. WALLACE ADAIR
KEITH E. PUGH, JR.
Howrey & Simon
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Counsel for Appellee
Shell Oil Company

JESSE P. LUTCN, JR.
JOHN E. BAILEY
P. O. Box 2100
Houston, Texas 77001

Counsel for Appellee
Gulf Oil Corporation

GEORGE A. SEARS
RICHARD W. ODGERS
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California 94104

Counsel for Appellee
Standard Oil Company of California

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

RUSSELL SELBY, being duly sworn, deposes and says:

1. I am over the age of 18 years and am not a party hereto.

2. On the 28th day of September, 1977 I served the annexed Suggestion for Rehearing En Banc on the attorney named below by personally delivering three copies thereof to him at the address specified for service of papers, as follows:

Robert B. Fiske, Jr.
United States Attorney for the
Southern District of New York
One St. Andrews Plaza
New York, New York 10007

Attention: Nathaniel L. Gerber, Esq.

Russell Selby

Sworn to before me this
28th day of September, 1977.

Carol A. Maenza
Notary Public

CAROL A. MAENZA
Notary Public, State of New York
No. 41-4632556
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1978